No. 89-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,
—v.—
PATRICK FEENEY,
Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,
—v.—
CHARLES T. FOSTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LAWRENCE MENTZ
Counsel for Amici Curiae
AMERICAN AIRLINES, INC.
COMPAGNIE NATIONALE AIR FRANCE
DEUTSCHE LUFTHANSA A.G.
FINNAIR Oy
IBERIA, LINEAS AEREAS DE ESPANA S.A.
JAPAN AIR LINES CO., LTD.
KONINKLIJKE LUCHTVAART MAATSCHAPPIJ, N.V.- KLM ROYAL DUTCH AIRLINES
SWISS AIR TRANSPORT CO., LTD.
30 Rockefeller Plaza
Suite 4340
New York, New York 10112
(212) 581-7575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-386

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

—v.—

PATRICK FEENEY,

Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

—v.—

CHARLES T. FOSTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*

American Airlines, Inc. ("American"), Compagnie Nationale Air France ("Air France"), Deutsche Lufthansa A.G. ("Lufthansa"), Finnair Oy ("Finnair"), Iberia, Lineas Aereas De Espana S.A. ("Iberia"), Japan Air Lines Co., Ltd. ("JAL"), Koninklijke Luchtvaart Maatschappij, N.V.-KLM Royal Dutch Airlines ("KLM") and Swiss Air Transport Co.,

Ltd. ("Swissair") respectfully move to file the attached Brief *amici curiae* in this case. The consent of counsel for Respondents has been obtained. The consent of counsel for Petitioner has been requested but was refused.

The interest of American, Air France, Lufthansa, Finnair, Iberia, JAL, KLM and Swissair in this case stems from the fact that each is an airline that occupies and uses facilities at airports owned or operated by the Port Authority of New York and New Jersey ("Port Authority"), Petitioner's parent corporation, pursuant to a written contract or contracts between the Port Authority and the respective airlines for the purpose of engaging in air commerce of the United States. Among those airports is John F. Kennedy International Airport ("JFK"), formerly Idlewild International Airport and New York International Airport.

In legislation enacted by the States of New York and New Jersey, the Port Authority consented to suit against it by scheduled airlines upon any written contract for the use or occupancy of space, premises or facilities at New York International Airport, now JFK. The language of the statutory consent to suit is substantially similar to the language presented to the Court for review in this case. *Compare* N.Y. UNCONSOL. LAWS §§ 7101-12 (McKinney 1979) *and* N.J. STAT. ANN. §§ 32:1-159 to 32:1-168 (West 1983) *with* N.Y. UNCONSOL. LAWS §§ 7131-36 (McKinney 1979) *and* N.J. STAT. ANN. §§ 32:1-169 to 32:1-174 (West 1983). Each *amicus curiae* is interested in the proper interpretation of the substantially similar statutory consent to suit language applicable to written contracts between scheduled airlines and the Port Authority for the occupancy or use of space and facilities at JFK International Airport.

Moreover, it is the position of *amici* that the differences between the language in the consent to suit under review in this case and language in the consent to suit referring specifically to written contracts with the Port Authority are relevant to the proper interpretation of the statutory consent to suit under review and the disposition of this case. Neither the Petitioner

nor Respondents have adequately addressed those differences and their relevance to the issues presently before the Court.

The interest and position of the *amici curiae* are set forth more fully in their Brief attached to this motion.

/s/ LAWRENCE MENTZ
Lawrence Mentz
Counsel for Amici Curiae
American Airlines, Inc.
Compagnie Nationale Air France
Deutsche Lufthansa A.G.
Finnair Oy
Iberia, Lineas Aereas
De Espana S.A.
Japan Air Lines Co., Ltd.
Koninklijke Luchtvaart
Maatschappij, N.V.-KLM
Royal Dutch Airlines
Swiss Air Transport Co. Ltd.
30 Rockefeller Plaza
Suite 4340
New York, New York 10112
(212) 581-7575

Dated: January 16, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Constitutional Provisions, Treaties, Statutes and Regulations:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-386

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

—v.—

PATRICK FEENEY,

Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

—v.—

CHARLES T. FOSTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

American Airlines, Inc. ("American"), Compagnie Nationale Air France ("Air France"), Deutsche Lufthansa A.G. ("Lufthansa"), Finnair Oy ("Finnair"), Iberia, Lineas Aereas De Espana S.A. ("Iberia"), Japan Air Lines Co., Ltd. ("JAL"), Koninklijke Luchtvaart Maatschappij, N.V.-KLM Royal Dutch Airlines ("KLM") and Swiss Air Transport Co.,

Ltd. ("Swissair") respectfully submit this Brief *amici curiae* in support of Respondents Patrick Feeney and Charles T. Foster for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit with respect to its decision in *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628 (2d Cir. 1989), *cert. granted*, ____ U.S. ____, 110 S. Ct. 320 (1989).

THE INTEREST OF *AMICI CURIAE*

Each of the *amici curiae* is an air carrier or a foreign air carrier as defined by Section 101(3) and Section 101(22) of the Federal Aviation Act of 1958 ("FAA Act"), 49 U.S.C.A. §§ 1301(3), 1301(22) (1976 & Supp. 1989), engaged in foreign, interstate or overseas air transportation as defined by the FAA Act. Each of the *amici curiae* is also an airline designated by the respective countries of which they are a national to perform air transport services under the applicable bilateral air services agreement. *See, e.g.*, Protocol Relating to the United States of America-Federal Republic of Germany Air Transport Agreement of 1955, November 1, 1978, United States-Germany, art. 2, 30 U.S.T. 7323, 7325-26, T.I.A.S. 9591. Air France, Lufthansa, Finnair, Iberia and Swissair are each also an "agency or instrumentality" of a foreign state and a "foreign state" as defined by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C.A. § 1603 (Supp. 1989).

Each *amicus curiae* operates scheduled airline flights to and from the United States, including John F. Kennedy International Airport ("JFK"), thus engaging in air commerce of the United States. The regime under which air commerce is conducted is generally governed by multilateral international agreements, *e.g.*, Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295 ("Chicago Convention"), bilateral international agreements, *e.g.*, Protocol Relating to the United States of America-Federal Republic of Germany Air Transport Agreement of 1955, November 1, 1978, United States-Germany, 30 U.S.T.

7323, T.I.A.S. 9591, and Federal law, *e.g.*, FAA Act, 49 U.S.C.A. § 1301 *et seq.* (1976 & Supp. 1989).

Airports, including JFK, are obviously an essential part of air commerce. Their activities are also governed in part by multilateral international agreements, *e.g.*, the Chicago Convention, and Federal law, *e.g.*, the FAA Act, the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C.A. §§ 2101-25 (Supp. 1989) and the Airport and Airway Improvement Act of 1982, 49 U.S.C.A. §§ 2201-27 (Supp. 1989). All airlines, including scheduled airlines such as *amici curiae*, are extremely interested in nondiscriminatory treatment by the owners and operators of the airports into and out of which they fly, including JFK. Occasionally, significant disputes arise with airport operators, including the Port Authority of New York and New Jersey ("Port Authority"), Petitioner's parent, over the proper interpretation and application of Federal law securing nondiscriminatory treatment for national and international airlines. *See, e.g., Global International Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir. 1984); *British Airways Board v. Port Authority*, 558 F.2d 75 (2d Cir. 1977).

All airlines, and particularly *amici curiae*, have an interest in seeing that any dispute with an airport operator, such as the Port Authority, over the proper interpretation or application of Federal law, bilateral or multilateral international agreements, can be presented to Federal courts for interpretation rather than to various State courts throughout the country. In addition, those *amici curiae* which are foreign states as defined by the FSIA believe they are entitled to have such disputes submitted to Federal courts. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983).

The interests of *amici curiae* are, therefore, twofold. First, their interest is in the proper interpretation of the Port Authority statutory consent to suit at issue in this case and in the proper interpretation of the Port Authority's separate statutory consent to suit with respect to written contracts between *amici curiae* and the Port Authority. Second, the scheduled airlines as *amici curiae* here are extremely interested in ensuring that they

can avail themselves of a Federal forum in order to protect their rights to nondiscriminatory treatment by airport operators: rights which are secured to them by multilateral and bilateral international agreements and Federal law.

STATEMENT

This Brief is directed to the issue of whether the statutes of the States of New York and New Jersey have consented to suits against the Port Authority in certain Federal courts and, thus, effected a partial waiver of any Eleventh Amendment immunity from suit to which the Port Authority and Petitioner, its wholly-owned subsidiary, may have been entitled. This Brief will not address the Port Authority's entitlement in the absence of any waiver to Eleventh Amendment immunity, except to state *amici curiae* agree with Respondents that the court below properly decided in accordance with applicable precedent of the Court that the Port Authority is not an agency or arm of the States within the meaning of the Eleventh Amendment entitled to invoke the Amendment's immunity.

SUMMARY OF ARGUMENT

Considered in its entirety, the statutory consent to suit enacted by the States of New York and New Jersey authorized suits against the Port Authority in specified judicial districts whose Federal courts are geographically situated within the boundaries of the Port of New York. By consenting to suit in these particular Federal courts, the statute effected a partial waiver of any Eleventh Amendment immunity that may otherwise have existed. No other reasonable construction of the statute is possible without rendering meaningless or superfluous significant portions of the statute. Moreover, the language raises such an overwhelming implication of consent to suit in particular Federal courts that neither the Port Authority nor the courts construing the statute have been able to explain in any other rational way the meaning or intent of the language employed.

The designation of certain courts, including particular Federal courts, is in accordance with decisions of the Court permitting a State to condition any consent to suit on where it may be subject to suit.

A review of other Port Authority statutory consents to suit enacted both before and after the statute at issue here confirms that the text of the statutory consent in this case expressly permitted suits against the Port Authority in specified Federal courts. A subsequent statutory consent even clarifies the Port Authority's dual citizenship in both the States of New York and New Jersey and such a designation has no conceivable meaning except in the context of Federal diversity jurisdiction.

Finally, shortly after enactment of the statutory consent to suit at issue here, the Port Authority admitted in Federal court that if the conditions attached to the consent were met, Eleventh Amendment immunity was waived.

ARGUMENT

POINT I

THE LANGUAGE OF THE STATUTORY CONSENT TO SUIT MANIFESTS AN UNAMBIGUOUS INTENT TO SUBJECT THE PORT AUTHORITY TO SUIT IN SPECIFIED FEDERAL COURTS

The standard set by the Court for determining whether particular statutory language emanating from Congress or a State legislature constitutes either abrogation or waiver of a State's Eleventh Amendment immunity is clear:

> [W]e have held that a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' "

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985) (citations omitted). Petitioner and its supporting *amici*

take the position that analysis of a portion of the statutory language under consideration, providing for "consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority", N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979), reveals the consent to fall far short of the Court's requirements to establish waiver. Brief for Petitioner at 34-35; Brief for *Amici Curiae* in Support of Petitioner at 13. Both conclude that the quoted statutory language is merely a waiver of State sovereign immunity and, standing alone, cannot serve as a waiver of Eleventh Amendment immunity. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 n.9 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); Brief for Petitioner at 35; Brief of *Amici Curiae* in Support of Petitioner at 13.

A statute should not be read as an isolated pronouncement, however. Other portions of the same act, to the extent they constitute a whole and lend meaning to the whole, must be considered simultaneously. *See Pennsylvania v. Union Gas Co.*, ____ U.S. ____, 109 S. Ct. 2273, 2278 n.2 (1989) (plurality opinion). All sections of a particular act should be read together because, together, they constitute the law. *Id.* at 2296 (Scalia, J., concurring in part and dissenting in part).

Either one of two criteria must be satisfied by a State statute to constitute a waiver of Eleventh Amendment immunity. The State statute must waive the immunity by "express language" or the statute must do so "by such overwhelming implication from the text as [will] leave no room for any other construction." *Atascadero*, 473 U.S. 234, 239-40. There is no requirement, however, that the Eleventh Amendment be specified *in haec verba* for State statutory language to constitute a wavier of its immunity.[1] *See Pennsylvania v. Union Gas Co.*, ____ U.S.

1 In order to satisfy the concern that abrogation by Congress, unwanted by the States, of Eleventh Amendment immunity could alter the balance of sovereignty between the Federal Government and the States, it would appear the Court could require that Congress specifically mention the Eleventh Amendment in any legislation intended to abrogate the immunity it provides. It is submitted, however, that it would be an unwarranted intrusion upon the powers of the State legislatures to require that any effective waiver by a State of its Eleventh Amendment immunity specifically refer to the Amendment. Such a requirement would appear not to be justified by a desire to avoid construing a State statute as an effective waiver when a State's intent to consent to suits in Federal court is otherwise clear.

at ____, 109 S. Ct. at 2280 n.4 (plurality opinion); *id.* at 2295 n.7 (White, J., dissenting). If a State statue did mention the Eleventh Amendment in an immunity waiver statute it would, undoubtedly, be found an effective waiver of the Amendment's immunity. *Id.* Similarly if a State immunity waiver statute stated in express language its "consent to be sued in Federal court" an effective Eleventh Amendment immunity waiver presumably would also be found.

Other language can also constitute a waiver, for the Court has not endowed any particular language with talismanic significance. When viewed as a whole, which it must be, the Port Authority statutory consent to suit language under review satisfies both the "express language" criteria and the "overwhelming implication" criteria.

A. The Statutory Consent to Suit Expressly Permits Suits Against the Port Authority in Certain Federal Courts

Sections 7101 and 7106 of New York's Unconsolidated Laws were enacted at the same time. Act of March 30, 1950, ch. 301, §§ 1, 6, 1950 N.Y. Laws 979, 980. At a minimum, therefore, Sections 7101 and 7106 must be read together to determine the extent of the consent to suit and the conditions attached to it. *Pennsylvania v. Union Gas Co.*, ____ U.S. at ____, 109 S. Ct. at 2278 n.2 (plurality opinion).

The first section of the statute consenting to suit against the Port Authority, N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979), is unlimited in scope, not restricted to any particular parties, courts or types of relief except, with respect to penalties, causes of action accruing before the statute's effective date and injunctive relief, as provided in four subsequent sections, N.Y.

UNCONSOL. LAWS §§ 7102-05 (McKinney 1979), none of which have any bearing on the question presented. *See Trippe v. Port of New York Authority*, 14 N.Y. 2d 119, 124-25, 249 N.Y.S. 2d 409, 412, 198 N.E.2d 585, 587 (1964). Section 7106 conditions the consent to suit in Section 7101 and provides in relevant part

> The foregoing consent [to suit in section 7101] is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings . . . .

N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979).

Although expressed in terms of "venue", the language of Section 7106 specifically conditions the Section 7101 consent to suits, *inter alia*, to a "judicial district established by . . . the United States, and situated wholly or partially within the port of New York district." *Id.* In itself, this language is an express statement that suits against the Port Authority in Federal judicial districts have been otherwise consented to by Section 7101.

The language used in the statute in 1950 to consent to suit against the Port Authority only in certain Federal courts is nothing more than a precise specification as to the extent of the consent. The language is also a precursor of the same principle applied today in the Eleventh Amendment context. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued"). The unlimited consent to suit in Section 7101 read together with Section 7106 specify in "express language" *where* the consent to suit is effective. The *where* specified includes Federal judicial districts within the Port district. It must, therefore, be taken to refer to Federal courts within those Federal judicial districts if the language is to be given any meaning at all.

B. The Text of the Statutory Consent to Suit Gives Rise to the Overwhelming Implication that Suits in Certain Federal Courts Were Authorized

Conditioning the Port Authority's consent to suits to those suits brought only in certain courts, including Federal courts, conveys an "overwhelming implication from the text" that in the absence of such a limitation the consent to suit would otherwise have been effective as to all courts in the State, including all Federal courts. *See Pennsylvania v. Union Gas Co.*, ____ U.S. at ____, 109 S. Ct. at 2278-80 (plurality opinion) ("Unless Congress intended to permit suits brought by private citizens against the States, therefore, the highly specific language of § 101(20)(D) was unnecessary"); *id.* at 2296 (Scalia, J., concurring in part and dissenting in part) ("The inclusion of States, apparently for all purposes, within the definition of 'person', reinforced by the language of the limitation that assumes State liability equivalent to the liability of private individuals, leaves no fair doubt that States are liable for money damages"). *Cf. Trippe v. Port of New York Authority*, 14 N.Y. 2d 119, 124-25, 249 N.Y.S. 2d 409, 412, 198 N.E. 2d 585, 587 (1964) ("The sweeping coverage of chapter 301 [§§ 7101-12] simply makes impossible any exclusion therefrom of any particular kinds of suits except for those specifically excluded in other parts of chapter 301. . . .").

No other rational explanation or reasonable construction of Sections 7101 and 7106 with its "venue" provision, has been or can be presented. Neither Petitioner nor any court construing the Port Authority consent to suit has been able to suggest a construction which would avoid a finding by the Court that the States of New York and New Jersey did not understand the distinction between "venue" and "jurisdiction." *See also* Brief for *Amici Curiae* in Support of Petitioner at 17. Petitioner at one point even suggested the venue provision was an effort to restrict the Federal court venues in which the Port Authority might be sued where consent was unnecessary. That suggestion was, as it should have been, summarily rejected. *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, 49 (3d in

1989) ("It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required").

Petitioner argues that the "venue" provision in section 7106, insofar as it refers to "judicial districts established by . . . the United States", is not an affirmative consent to "jurisdiction" in the Federal courts. It supplies no explanation, however, for its meaning or its inclusion in the section or, indeed, its inclusion in the entire statutory structure of Sections 7101 to 7112. When, however, the "sweeping coverage of chapter 301 [§§ 7101-12]", *Trippe v. Port of New York Authority*, 14 N.Y.2d at 124-25, 249 N.Y.S.2d at 412, 198 N.E.2d at 587, and the nature of the consent to suit, Section 7101, is recognized as not limited in scope, in extent or to any particular court, whether State or Federal, the subsequent limitations on that consent embodied in Sections 7102 through 7112 (all part of chapter 301) are completely understandable. One of the conditions to the consent is that the Port Authority shall be sued only in specified courts, including certain Federal courts. If suit is brought in any other court, i.e., the wrong "venue", then the consent's condition is not satisfied; the consent is, effectively, withdrawn and deprives such a court of "jurisdiction."[2] *See* Brief for Appellee Port Authority at 7, 12, *Rao v. Port of New York Authority*, 222 F.2d 362 (2d Cir. 1954). App. 8, 13.

No other reasonable construction of the statutes is possible. The text of the Port Authority consent to suit, when read with its accompanying conditions, gives rise to the "overwhelming implication" that the Port Authority consented to suits against it in certain specified Federal courts and, consequently, waived any Eleventh Amendment immunity to which it may have been entitled.

2 Construing the statutory framework in this way eliminates any alleged confusion purportedly resulting from use of "venue" terminology and permits the normal presumption that the States of New York and New Jersey understood the difference between "venue" and "jurisdiction".

POINT II

ANALYSIS OF OTHER STATUTES CONSENTING TO SUITS AGAINST THE PORT AUTHORITY COMPELS THE CONCLUSION THAT IT AGREED TO BE SUBJECT TO SUIT IN CERTAIN FEDERAL COURTS

There is no question presented here[3] with respect to a Congressional abrogation of any Eleventh Amendment immunity that the Port Authority may be entitled to assert. Congressional consent to the bi-state compact creating the Port Authority occurred in 1921. 42 Stat. 174 (1921). Until passage of the consent statutes, the Port Authority had been totally immune from suit. *See, e.g., Port Authority Police Benevolent Association v. Port Authority of New York*, 819 F.2d 413, 418 (3d Cir. 1987), *cert. denied*, ____ U.S. ____, 109 S. Ct. 344 (1987). There was no "sue and be sued" clause in the original bi-state compact or the Congressional consent that would raise the issue of Congress' intent with respect to approval of the compact. *See, Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959).

The consent to suit at issue here, Act of March 30, 1950, ch. 301, 1948 N.Y. Laws 979 (codified at N.Y. UNCONSOL. LAWS §§ 7101-12 (McKinney 1979)), was not the first instance when the States had consented to suit against the Port Authority. They had previously consented to suits against the Port Authority for certain specified purposes. *See* Act of April 11, 1947, ch. 802, 1947 N.Y. Laws 1481 (current version at N.Y. UNCONSOL. LAWS §§ 6631-47 (McKinney 1979)). That earlier statute waiving the Port Authority's immunity was somewhat different in scope from the one at issue here and, although nearly identical, analysis of the differences in language and structure employed

3 Whether the Foreign Sovereign Immunities Act of 1976 constitutes a Congressional abrogation of any Port Authority Eleventh Amendment Immunity if sued by an airline which qualifies as a "foreign state" is not presented here either. Pursuant to the reasoning in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 488-89, and the teachings of the Court regarding abrogation of immunity, those airline *amici curiae* which do so qualify submit that the FSIA abrogates any such immunity.

is helpful and relevant. *Cf. Pennsylvania v. Union Gas Co.*, ____ U.S. at ____, 109 S. Ct. at 2279 ("It is also highly significant that . . . Congress used language virtually identical to that it chose in waiving the Federal Government's immunity from suits for damages under CERCLA"). A review of the earlier consent's background and amendments persuasively demonstrates that the subsequent statutory consent to suit against the Port Authority in 1950, the one at issue here, included a consent to suit in Federal court.[4]

The first consent to suit against the Port Authority became law on April 11, 1947. *See* Act of April 11, 1947, ch. 802, § 8(c), 1947 N.Y. Laws 1481, 1485 (current version at N.Y. UNCONSOL. LAWS § 6638(c)). The consent was included in a law passed "to facilitate the financing and effectuation of air terminals by the Port of New York Authority and agreeing with the State of New Jersey with respect thereto." *Id.*, Preamble. The consent itself was brief and confined to suits with respect to agreements reached by the Port Authority pursuant to the power granted by the statute.

> The states of New York and New Jersey consent to suits against the Port Authority upon such agreement by any county, city, borough, village, township, municipality, public agency or authority for the recovery of any moneys agreed to be paid by the Port Authority thereunder, and for such purpose only, and any judgment therein against the Port Authority shall be payable only from such funds as the Port Authority may have available for the payment of such judgment.

Act of April 11, 1947, ch. 802, § 8(c), 1947 N.Y. Laws 1481, 1485.

---

4 This analysis is not contrary to the Court's holding in *Dellmuth v. Muth*, ____ U.S. ____, 109 S. Ct. 2397, 2401 (1989), that legislative history cannot be resorted to when construing a Congressional enactment in the Eleventh Amendment context. A State statute is under consideration here and the concerns which led to the holding in *Dellmuth* are not as weighty when State legislative action is under consideration. *See* n.1, *supra*. In any event, this analysis only confirms what otherwise clearly appears from the text.

This consent to suit was amended one year later. Among other provisions, the 1948 amendment to section 8(c) of the 1947 Act included a paragraph dealing with "venue." It provided as follows:

> When rules of venue are applicable, the venue of any such suit, action or proceeding shall be laid in the county or judicial district in which the air terminal, which is the subject matter of such agreement between the Port Authority and the city or other municipality, or any part thereof, is located.

Act of April 3, 1948, ch. 785, § 1, 1948 N.Y. Laws 1440, 1441 (codified at N.Y. UNCONSOL. LAWS § 6638(c) (McKinney 1979)).

The "venue" provision added by the 1948 Act to the statutory consent to suit with respect to acquisition of air terminals used language referring to a "judicial district in which the air terminal . . . is located." *Id.* In the 1950 Act at issue here, the "venue" language was modified in three respects from that in the 1948 amendment. *Compare* N.Y. UNCONSOL. LAWS § 6638(c) (McKinney 1979) *with* N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979). First, proper "venue" under section 7106 was made a condition to the consent to suit in section 7101. Second, the reference to "judicial districts" was clarified by addition of the phrase "established . . . by the United States." Third, a sentence was added deeming the Port Authority "a resident of each such . . . judicial district for the purpose of such suits, actions or proceedings." N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979).

All of these modifications reinforce the conclusion reached from analysis of the text itself that the States of New York and New Jersey in the 1950 Act consented to suits against the Port Authority in certain courts, including Federal courts within the Port district. Unlike the limited consent to suit in the 1947 statute, which was confined to suits by cities or municipalities arising out of agreements transferring air terminals to the Port Authority, N.Y. UNCONSOL. LAWS § 6638(c) (McKinney 1979), the 1950 statutory consent itself was all encompassing

and not restricted to any particular parties, courts, types of action or subject matter. N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979); *Trippe v. Port of New York Authority*, 14 N.Y. 2d at 124-25, 249 N.Y.S. 2d at 412, 198 N.E.2d at 587. The "venue" provision in the 1950 statutory consent necessarily had to be, and was, recast to condition the unlimited consent of Section 7101. The phrase "established . . . by the United States" made clear that the reference to "judicial district" meant Federal judicial districts. Finally, the addition of the sentence establishing the residence of the Port Authority for "venue" purposes comported with recent changes in the Federal general venue statute basing venue on the "residence" of a defendant.[5] *See* Act of June 25, 1948, ch. 646, 62 Stat. 935 (current version at 28 U.S.C. § 1391).

A further comparison of the 1950 statutory consent to suit with the 1953 statutory consent to suit against the Port Authority, Act of March 24, 1953, ch. 143, 1953 N.Y. Laws 152 (codified at N.Y. UNCONSOL. LAWS §§ 7131-36 (McKinney 1979)), also reinforces the conclusion that the consent to suit at issue here encompassed a consent to suit in Federal court. *Compare* N.Y. UNCONSOL. LAWS §§ 7101, 7106 (McKinney 1979) *with* N.Y. UNCONSOL. LAWS §§ 7131, 7133 (McKinney 1979). The 1953 consent to suit was specifically proposed by the Port Authority in accordance with an understanding reached between the Port Authority and scheduled airlines, including one of the *amici*, operating at Idlewild (now JFK and formerly New York) International Airport.[6] *See* Letter from Sidney Goldstein, Port Authority General Counsel, to Hon. George

5 The unlimited consent, the conclusive reference to Federal courts and delineation of "residence" clearly anticipated diversity jurisdiction in certain Federal courts because with the 1950 Act the Port Authority would be subject to suits by citizens of States other than New York and New Jersey and by aliens. The 1947 consent to suit, as amended, only applied to cities or municipalities of those two States.

6 This specific consent may have been necessary to avoid the effect of Section 7103 of the 1950 Act barring suits on contracts entered into before the effective date of the consent. *See* N.Y. UNCONSOL. LAWS § 7103 (McKinney 1979).

M. Shapiro, Counsel to the Governor (March 11, 1953) (This law "would implement the memorandum of agreement executed in 1945 by the Airlines and the Port Authority, through the personal efforts of Governor Dewey, to make the definitive leases for use of New York International Airport by the Airlines enforceable in the courts"). App. 16.[7]

The venue section of the 1953 statute is almost identical to the venue section in the 1950 consent statute.[8] *Compare* N.Y. UNCONSOL. LAWS § 7133 (McKinney 1979) *with* N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979). The 1953 "venue" provision differs from the 1950 provision in two respects only: (1) it does not contain a separate consent to liability for tortious acts as if the Port Authority were a private corporation and (2) it has added language that the Port Authority shall be deemed a citizen of both New York and New Jersey. N.Y. UNCONSOL. LAWS § 7133 (McKinney 1979) ("The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings *and shall be deemed to be a citizen of both of said two states*") (emphasis added).

The language regarding the citizenship of the Port Authority was not included in the Act of March 30, 1950, Ch. 301, § 6, 1950 N.Y. Laws 979, 980, N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979). Addition of the citizenship language to the later 1953 statute had no impact upon the ability of any state court to hear an action against the Port Authority. The only conceivable reason for specifying the citizenships of the Port Authority was to clarify the dual aspect of its citizenship and

7 The copy of the correspondence in the Appendix to the Brief was in the New York Legislative Bill Jacket accompanying the 1953 Act upon its approval by the Governor of New York.

8 The structure of the 1953 statute, however, is similar to the 1948 venue provisions. Because both the 1947 consent to suit, as amended in 1948, and the 1953 consent to suit were of limited scope, effective only as to certain specified entities for suits arising out of specified written agreements, the "venue" provision in the 1947 and 1953 Acts are not "conditions" to the consents. For the unlimited 1950 consent to suit at issue here, its "venue" provisions are structured as a condition to the consent.

limit diversity jurisdiction in a Federal court to those instances where the plaintiff was a citizen of some State or country other than New York or New Jersey.[9]

Analysis of each of the Port Authority's consent to suit statutes, enacted both before and after the one at issue here, is instructive and persuasively demonstrates that the 1950 statute, N.Y. UNCONSOL. LAWS §§ 7101-12 (McKinney 1979), did, and was intended to, consent to suit against the Port Authority in certain geographically specified Federal courts and was, consequently, an effective, albeit geographically restricted, waiver of any Eleventh Amendment immunity.

POINT III

THE PORT AUTHORITY HAS PREVIOUSLY ADMITTED IT CONSIDERED ELEVENTH AMENDMENT IMMUNITY TO HAVE BEEN WAIVED IF THE CONDITIONS OF THE STATUTORY CONSENT TO SUIT WERE SATISFIED

Shortly after enactment of the 1950 consent statute, a diversity suit was commenced against the Port Authority for damages resulting from an accident in the United States District Court for the Eastern District of New York. In the district court the Port Authority moved for dismissal of the complaint for lack of subject matter jurisdiction for failure to comply with the conditions of the consent statute in that the plaintiff (a) failed to commence his action within one year and (2) failed to serve a notice of claim. *Rao v. Port of New York Authority*, 122 F. Supp. 595, 596 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 362 (2d Cir. 1955). *See also* Motion for Dismissal of Complaint, Transcript

9 The specification of the Port Authority's citizenship in the 1953 Act did not make any substantive change and was clearly for clarification purposes only. The specification of residence in the Port Authority's 1950 statutory consent to suit was sufficient under the Fourteenth Amendment for diversity purposes because every U.S. citizen is also a citizen of the State of residence. U.S. CONST. amend. XIV, § 1. If a substantive change was accomplished by addition of the phrase, then this case will not be controlling with respect to construction of the 1953 statutory consent to suit.

of Record at 3-4, *Rao v. Port of New York Authority*, 222 F.2d 362 (2d Cir. 1955). Both of those requirements were conditions of the consent to suit and were contained in Section 7 of chapter 301 of the Laws of New York. N.Y. UNCONSOL. LAWS § 7107 (McKinney 1979).

No claim was made that the consent to suit, N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979), did not permit suit in Federal court as a result of any Eleventh Amendment immunity from suit. *See* Affidavit of Francis X. Curley, Transcript of Record at 5-8, *Rao*, *id.* The district court granted the motion to dismiss on the ground that it was not commenced within the one year period upon which the consent to suit was conditioned. *Rao*, 122 F. Supp. at 597.

Plaintiff appealed from the dismissal. There is no doubt that in the *Rao* appeal the Port Authority was aware of its Eleventh Amendment immunity and *considered it to have been waived* if the conditions of the consent statute were met. *See* Brief of Appellee Port Authority at 7, *Rao v. Port of New York Authority*, 222 F.2d 362 (2d Cir. 1955). App. 8.

> Appellant's brief (pp. 2, 3) concedes that his standing to sue the Port Authority was created by the bi-state suability legislation (Ch. 301, Laws of N.Y. 1950; Ch. 204, Laws of N.J. 1951) and that the courts have jurisdiction over the person of the Port Authority and the subject matter of the action only where the statute has been complied with. *Since compliance is absent, the Eleventh Amendment effectively bars jurisdiction over this suit.*

Id. (emphasis added).

The Port Authority was intimately familiar at the time of the *Rao* case with the intent and scope of the 1950 consent to suit. The General Counsel to the Port Authority at the time of the *Rao* appeal, Sidney Goldstein, who was the attorney for the Port Authority on the Second Circuit Brief, was Assistant General Counsel in 1948, before enactment of the 1950 consent to suit.

In the *Rao* case the Port Authority argued that in the absence of compliance with the statute, the Eleventh Amendment barred jurisdiction. Conversely, it effectively admitted that any Eleventh Amendment immunity is waived if there has been compliance with the statute.

This admission by the General Counsel of the very entity to which the statute applies is extraordinarily significant. It is close in time to enactment of the consent to suit statute. It establishes an awareness on the part of the Port Authority that the Eleventh Amendment arguably applied to bar a lawsuit in the absence of compliance with the conditions imposed on the consent to suit. Accordingly, it is an authoritative pronouncement of the extent and scope of the consent to suit and Petitioner should not now be heard to contradict the previous admission of the Port Authority.[10]

Neither the passage of time, decisions of the Court nor a change in the Port Authority's position can rescind the consent to suit against the Port Authority in certain Federal courts given by the legislatures of New York and New Jersey: only the States can modify or revoke the consent if they choose to do so, assuming revocation would not contravene any other law. Until such time as New York and New Jersey revoke or modify the consent to suit, the Federal courts specified in Section 7106 have jurisdiction over suits against the Port Authority.

---

10 Had the Attorney General of the State of New York in 1954 made to the Second Circuit the statement contained in the *Rao* Brief, it is submitted that the Court would give little or no weight to a contradictory statement by New York's present Attorney General as to the intent or meaning of a statute enacted 40 years ago, unless based on newly discovered and conclusive legislative history.

CONCLUSION

The decision of the court below should be affirmed in all respects.

Respectfully submitted,

LAWRENCE MENTZ
Counsel for Amici Curiae
American Airlines, Inc.
Compagnie Nationale Air France
Deutsche Lufthansa A.G.
Finnair Oy
Iberia, Lineas Aereas
De Espana S.A.
Japan Air Lines Co., Ltd.
Koninklijke Luchtvaart
Maatschappij, N.V.-
KLM Royal Dutch Airlines
Swiss Air Transport Co., Ltd.
30 Rockefeller Plaza
Suite 4340
New York, New York 10112
(212) 581-7575

Dated: January 16, 1990

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHANNAPRAGADA S. RAO, also known as
RAO S. CHANNAPRAGADA,
Plaintiff-Appellant,

against

THE PORT OF NEW YORK AUTHORITY,
Defendant-Appellee,

and

PARKING LOT ASSOCIATES CORPORATION,
a California corporation,
Defendant.

BRIEF OF APPELLEE

SIDNEY GOLDSTEIN,
Attorney for Defendant-Appellee,
The Port of New York Authority.

JUDICIAL PRINTING CO., INC., 63 Beekman St., N. Y.—BEekman 3-0084-54

To be argued by
DANIEL B. GOLDBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHANNAPRAGADA S. RAO, also known as
RAO S. CHANNAPRAGADA,
Plaintiff-Appellant,

against

THE PORT OF NEW YORK AUTHORITY,
Defendant-Appellee,

and

PARKING LOT ASSOCIATES CORPORATION,
a California corporation,
Defendant.

BRIEF OF APPELLEE

Statement

This memorandum is submitted by The Port of New York Authority (hereinafter referred to as the Port Authority) defendant-appellee, in opposition to the appeal by plaintiff-appellant from an order of United States District Court for the Eastern District of New York dismissing the complaint against the Port Authority for lack of jurisdiction. This memorandum makes two points:

First, the instant order is not a final appealable order within the meaning of § 1291 of 28 U. S. C. A. and therefore this Court lacks jurisdiction.

Second, plaintiff-appellant has failed to comply with the jurisdictional requirements of the bi-state legislation waiving the sovereign immunity from suit against the Port Authority.

The order (R. 22, 23) dismissed plaintiff's complaint against the Port Authority, severing the cause of action as to it, in the suit against the Port Authority and California Parking Associates as joint defendants. The court found that plaintiff had failed to comply with the jurisdictional requirements conditioning the consent to suits against the Port Authority contained in Chapter 301, Laws of New York, 1950; Chapter 204, Laws of New Jersey, 1951.

The District Court did not make an express determination that there was no just reason for delay and merely directed entry of judgment.

Facts

As plaintiff concedes (Brief, p. 2), his sole standing to sue the theretofore immune Port Authority is found in the aforesaid bi-state statutes which consent to suits against the Port Authority as follows:

> "§ 7. The foregoing consent is granted upon the *condition* that any suit, action or proceeding prosecuted under this act *shall be commenced within one year after the cause of action therefor shall have accrued*, and *upon the further condition* that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this Act a *notice of claim shall have been served upon the Port Authority* by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced." (Emphasis added.)

Section 8 of the legislation sets forth the requisite contents of the notice of claim required by Section 7.

While the District Court did not decide the question of the adequacy of the appellant's notice of claim, basing its decision to dismiss solely on the jurisdictional grounds of Section 7 and while the Port Authority is not arguing the adequacy of the notice on this appeal it must be pointed out that the Port Authority contended below that it has never received from the plaintiff-appellant a proper notice of claim stating the place where and the manner in which his cause of action, if any, arose.

The facts which plaintiff seeks to fit within the framework of these jurisdictional pre-conditions to suit are contained in the opinion of the District Court by Judge RAYFIEL (R. 20):

> "The plaintiff concedes that the accident which is the basis of the action occurred on December 10, 1952, that the complaint was filed in this court on December 18, 1953, and that it was served on the defendant Port of New York Authority on December 24, 1953."

It is evident and conceded in plaintiff's brief (p. 3) that the action was commenced *not* within one year after the accident on which it is based, but was commenced 8 days afterward.

POINT I

The judgment sought to be appealed is not a final order within the meaning of 28 U. S. C. A. 1291 and, therefore, the Court of Appeals lacks jurisdiction.

The Court of Appeals has limited jurisdiction to hear appeals, *i.e.*, under 28 U. S. C. A. 1292, in certain limited situations not here applicable, and under 28 U. S. C. A. 1291 which provides that this Court may hear appeals from

> "final decisions of the district courts."

This is not a final decision within the intent of 28 U. S. C. A. 1291, for where a suit is brought against multiple parties whose liability is alleged to be "joint," a judgment terminating the action as to one or more, but less than all of the parties, is not final regardless of whether such a judgment is based on the merits or on jurisdictional or venue grounds. In *Atwater v. Inter American Coal Corp.*, 111 F. 2d 125 (C. A. 2d 1940) this court held:

> "• • • a judgment or order dismissing an action as to less than all of several defendants jointly charged is not a final decision for purpose of appeal. Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443; Bank of Rondout v. Smith, 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441; Menge v. Warriner, 5 Cir., 120 F. 816; Hewitt v. McCormick Lumber Co., 2 Cir., 22 F. 2d 925; Bush v. Leach, 2 Cir., 22 F. 2d 296; Fields v. Mutual Benefit Life Insurance Co., 4 Cir., 93 F. 2d 559; Moss v. Kansas City Life Insurance Co., 8 Cir., 96 F. 2d 108."

In addition to cases there cited, some of the more recent cases in point are:

Porter v. American Distilling Co., Inc., 157 F. 2d 1012 (C. A. 2d 1946);
Tauzin v. St. Paul Mercury Indemnity Co., 195 F. 2d 223 (C. A. 5th 1952);
Drown v. U. S. Pharmacopoeial Convention, 198 F. 2d 470 (C. A. 9th 1952);
Dunaway v. Standard Oil Co., 178 F. 2d 884 (C. A. 5th, 1949), cert. den. 339 U. S. 965 (1950);
Cuhn v. Canteen Food Service Inc., 150 F. 2d 55 (C. A. 7th 1945).

See generally, *Moore's Federal Practice*, 2d Ed. Vol. 56, p. 156, *et seq.*

In the present appeal we have the clearest case for the application of the rule—a complaint against two alleged

joint tort feasors and this Court's holding in the *Atwater* case, *supra* is dispositive of this point.

The rule of non-finality in cases of this character finds its basis in the theory that appeals are not to be brought piecemeal to the Courts of Appeal and has singular applicability to the facts in the instant case. Here recovery for one alleged harm founded on one factual pattern is sought against two different defendants allegedly jointly liable.

The foregoing compels the conclusion that the Court lacks jurisdiction to hear this appeal since liability in the instant matter is joint and a final order has not been rendered by the district court.

POINT II

The Court lacks jurisdiction because appellant has not met the jurisdictional condition, in the bi-state statutes consenting to suits against the Port Authority, that action must be commenced within one year from the date of accrual.

Appellant concedes that as the governmental agency of the States of New York and New Jersey the Port Authority is not subject to suit in the absence of express statutory consent (Brief, p. 2). He concedes also that the Court has jurisdiction of his suit only if he has complied with the conditions set forth in the recent legislation by which the states consented to suit against the Port Authority (Brief, p. 3). He concedes that those statutes impose as a "condition" of the consent therein given that suit be commenced within one year after the cause of action has accrued (Brief, p. 2), and he concedes that this suit was brought more than a year after the occurrence of the accident upon which it is based (Brief, pp. 2, 3).

Appellant seeks to retrieve his case, however, by asking the Court to hold that notwithstanding the express one year condition, the suability statutes permit suit within one year and sixty days after the accident because of the further condition in Section 7 that a prescribed notice be filed sixty days before the commencement of the action. The argument is based on three grounds:

> (a) that as "remedial legislation" the statutes should be liberally construed in favor of claimant;
>
> (b) that therefore the statutes must be construed to permit suit within one year and sixty days after the cause of action accrued; and
>
> (c) that the cause of action did not accrue until sixty days after the accident.

The argument is not well founded on any of these grounds for the following reasons:

(1) Because the statutes constitute waivers of sovereign immunity from suit, they must, under universal rules of construction of such statutes, be strictly construed to require precise conformity with all the conditions imposed.

(2) The statutes here involved have two independent conditions, one for the commencement of suit within a year after the cause of action accrues and the "further condition", independently stated, that a specified notice be served at least sixty days in advance of suit. Not only the internal evidence of the statutes but the rule of strict construction requires that both of these conditions be literally complied with.

(3) While it is true that the New York Civil Practice Act adds to a period of limitations time equivalent to the period of statutory stay, this cannot avail appellant because (a) as appellant con-

cedes, a New York statute cannot modify the bi-state suability statutes which constitute an agreement between New York and New Jersey susceptible of amendment only by both States acting concurrently (Brief, pp. 5, 6) and (b) the fact that the State of New York had to pass a statute to produce this result as a matter of local law, rebuts rather than supports an argument that the Port Authority suability statutes, without the equivalent of C. P. A. § 24, can be construed to extend the one year period expressly provided as a condition for consent to the Court's jurisdiction.

(4) The cases uniformly hold that a cause of action for negligence charged against a public agency accrues on the date of the alleged accident, even though a notice must be filed a specified number of days before suit may be commenced.

Each of these four reasons is discussed in the following subdivisions of this Point.

1. The statutes under which the Court's jurisdiction is alleged must be strictly construed against appellant because of the uniform rule of strict construction of statutes waiving sovereign immunity from suit.

Appellant's brief (pp. 2, 3) concedes that his standing to sue the Port Authority was created by the bi-state suability legislation (Ch. 301, Laws of N. Y. 1950; Ch. 204, Laws of N. J. 1951) and that the courts have jurisdiction over the person of the Port Authority and the subject matter of the action only where the statute has been complied with. Since compliance is absent, the Eleventh Amendment effectively bars jurisdiction over this suit.

Prior to the passage of the recent bi-state suability legislation, the Port Authority as a direct governmental agency of the States of New York and New Jersey, was

held to be clothed with the sovereign immunity from suit of the two States which created it, in a long and unbroken line of decisions in the Courts of the United States, New York and New Jersey:

Howell v. *Port of New York Authority*, 34 F. Supp. 797 (D. N. J. 1940);
Lord Electric Co. v. *The Port of New York Authority*, 281 App. Div. 693 (2d Dept. 1952);
Hergott v. *Port of New York Authority*, N. Y. L. J. June 10, 1944, p. 4422 (Sup Ct. N. Y.); aff'd 269 App. Div. 770 (1st Dept. 1945);
Marmor v. *The Port of New York Authority*, N. Y. L. J. October 3, 1952, p. 693 (Sup. Ct., Kings);
Kelly v. *The Port of New York Authority*, N. Y. L. J. June 20, 1951 p. 2290 (Sup. Ct., N. Y.);
The Port of New York Authority v. *Elman*, 196 Misc. 91 (N. Y. C. Mun. Ct. 1949);
Roochvarg v. *The Port of New York Authority*, 190 Misc. 406 (Sup. Ct., Queens 1947);
LeBeau Piping Corp. v. *City of New York and The Port of New York Authority, et al.*, 170 Misc. 644 (Sup. Ct., N. Y. 1938);
Voorhis v. *Cornell Cont. Corp. and The Port of New York Authority*, 170 Misc. 908 (N. Y. City Court 1938);
Pink v. *Port of New York Authority*, N. Y. L. J. February 3, 1938, p. 567 (Sup. Ct. N. Y.);
Miller v. *The Port of New York Authority*, 18 N. J. Misc. 601 (Sup. Ct. 1939).

See also:

Commissioner v. *Shamberg's Estate*, 144 F. 2d 998 (1944), cert. den., 323 U. S. 792 (1945).

It was in the light of this rule of immunity established by the foregoing cases that the Legislatures of New York

and New Jersey consented to suits against the Port Authority on compliance with the jurisdictional terms and conditions contained in the bi-state statutes granting such consent. Far from being ordinary remedial statutes as plaintiff-appellant argues, the bi-state legislation waives sovereign immunity and as such is to be strictly rather than liberally construed.

As the Court below held (R. 20) with regard to these statutes,

> "They provide that the action must be commenced within one year from the time that the cause of action accrued. Statutes wherein sovereign immunity against suit is waived must be strictly construed. *Schillinger* v. *United States*, 165 U. S. 163; *Mulhens* v. *Higgens*, 55 Fed. Supp. 42."

The requirement that claimants comply strictly with the jurisdictional conditions of statutes waiving sovereign immunity from suit is a rule of law which has been repeatedly stated by the Courts of the United States and New York. The State of New Jersey is to this day not suable, a fact highlighting the strictness with which these statutes must be construed. Restricting citation only to cases involving a requirement that suit or claim be instituted within a specified time as a condition and waiver of immunity the following are clear holdings that strict compliance with such a requirement is mandatory:

[Decisions in the United States Courts]

Schillinger v. *United States*, 155 U. S. 163 (1894);
United States v. *Michel*, 282 U. S. 656-659 (1930);
Munro v. *United States*, 303 U. S. 36-41 (1938);
United States v. *Sherwood*, 312 U. S. 584-590 (1940);
Graf v. *United States*, 24 F. Supp. 54 (U. S. Ct. of Claims, 1938);
Turkett v. *United States*, 76 F. Supp. 769, 770 (N. D. N. Y. 1948);

Ferd. Mulhens, Inc. v. *Higgins*, 55 F. Supp. 42, 44 (S. D. N. Y. 1943);
Franzino et al. v. *United States*, 83 F. Supp. 10, 11 (D. N. J. 1949);
Crescitelli v. *United States*, 66 F. Supp. 894 (E. D. Pa. 1946).

[Decisions in the Courts of New York]:

Gates v. *State*, 128 N. Y. 221, 228 (1891);
Ross v. *State*, 186 App. Div. 156 (3rd Dept. 1919);
Munzer v. *State*, 41 N. Y. S. 2d 98 (Ct. of Cl. N. Y. 1943);
Slocum v. *State*, 177 Misc. 114 (Ct. of Cl. N. Y. 1941);
Guaranty Trust Co. v. *State*, 186 Misc. 676 (Ct. of Cl. N. Y. 1946);
Wheeler v. *State*, 49 N. Y. S. 2d 939 (Ct. of Cl. N. Y. 1944).

In *Gates* v. *State*, *supra*, the leading case in New York, the rule is stated thus:

> "The citizen who seeks to avail himself of the privilege to sue the State, *must be held to strictness in procedure;* just as it must be held in all cases, where the remedy is created by and is enforceable solely through the provisions of some statute." (Emphasis added.)

Mulhens v. *Higgins*, 55 F. Supp. 42 (S. D. N. Y., 1943) is a particularly striking illustration of this rule of strict compliance. There, a claimant who had commenced suit *one day* after the termination of a two years' jurisdictional period set for suits against the United States was held to be barred from maintaining the action even though the last day of the two year period was a Sunday. The rule of strict construction negated the claimant's contention that the Federal Rules of Civil Procedure permitted

an additional day where the final day to act was a Sunday or Holiday. The Court held that the Rules of Civil Procedure could not broaden the Court's jurisdiction beyond that granted in the statute consenting to suits against the United States.

The rule was well stated by the Supreme Court of the United States in *Schillinger* v. *U. S.*, 155 U. S. 163 (1894):

> "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. *Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the Government.*" (Emphasis added.)

The result reached by the Court below is morally, as well as juridically sound. As the Court of Appeals of New York held in *Gates* v. *State*, 121 N. Y. 221, 228 (1891) of a late claim against the State of New York:

> "The result reached is not, on general grounds, unjust. The claimant's remedy was lost by the failure to make use of means from the very first moment available to him. There was in existence a tribunal before which the claim could at all times have been prosecuted against the State. The omission to commence the proceedings in the mode and within the time pointed out by the Act * * * which authorized such claims to be heard and determined * * * operated to bar any recovery."

2. The suability statutes involved have two separate and independent conditions, one for the commencement of suit within a year and the other for a sixty-day notice in advance of suit. A strict compliance with each is required.

The suability legislation under which the instant suit is maintained sets forth two distinct conditions precedent to the maintenance of an action against the Port Authority. Section 7 provides

> "The foregoing consent is granted upon *the condition* that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the *further condition* that in the case of any suit, action or proceeding for the recovery or payment of money prosecuted or maintained under this act, a notice of claim shall have been served upon the Port Authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced." (Emphasis added.)

It is significant that the requirements are not set forth as part of a single condition but are separately enumerated as an initial condition and a "further condition."

Both of these conditions are perfectly capable of compliance and hundreds of suits have been brought against the Port Authority alleging full compliance with both.

There is nothing ambiguous about the language of the statute so as to require construction at all. It is evident that the primary condition of the court's jurisdiction over the Port Authority is that suits against it must be commenced within one year. "One year" does not mean "one year and sixty days." The sixty-day provision produces the result that suit may not be commenced *sooner* than sixty days after the accident has happened upon which the claim is based. But there is nothing in the statute which

permits the claimant to delay the filing of his notice for a full year and thus by his own neglect to extend the period within which suit must be commenced beyond the one year prescribed by the statutes. While, in our view, the statutes are unambiguous and therefore not capable of construction so as to enlarge the one year period expressly set by the Legislatures, still if there were room for construction, the universal rule of strict construction of statutes waiving sovereign immunity from suit would compel the same conclusion.

A related situation occurred in *Bernreither* v. *City of New York*, 123 App. Div. 291, 293 (1st Dept., 1908), aff'd 196 N. Y. 506 (1909). The case did not involve a jurisdictional condition set in an immunity waiver statute but rather dealt with an ordinary period of limitations in a suit against a city. A one year period of limitations was set and there was another proviso in the statute that notice of intention to commence the action must be filed with the Corporation Counsel within six months after the cause had accrued. The court held that such a statute

> "• • • limits the time within which an action for negligence can be maintained against a city to one year after the cause of action therefor shall have accrued. It also requires as a condition precedent that notice of intention to sue shall have been filed with a law officer of the City within six months after such cause of action shall have accrued. Therefore, an *additional condition precedent was created* • • • *compliance with each provision had to be alleged and proved. They are independent provisions designed to conserve different objects* • • •." (Emphasis added.)

This case, affirmed by the Court of Appeals of New York and consistently followed, makes the case before the court an *a fortiori* situation in view of (a) the language in the bi-state suability legislation which specifically makes the notice of claim a "*further* condition" and (b) the fact that

it is a *jursdictional* condition and not a mere waivable limitations provision, thus invoking the rule for strict construction of immunity waivers.

A further reason exists in the statutes for keeping the two conditions separate, as the Legislatures set them forth. It will be noted that the sixty-day notice provision applies only if the suit is "for the recovery or payment of money." It would not apply in a suit for injunction, ejectment, to quiet title, for specific performance, or any other suit not for money damages. Appellant's contention therefore would establish a period of one year and sixty days for suits for money damages as against a period of one year in all other cases. This would be in the face of the single requirement of the Legislatures that suit must be commenced within one year in "*any* suit, action or proceeding."

3. Section 24 of the New York Civil Practice Act cannot enlarge the Court's jurisdiction which depends on statutory agreements between New Jersey and New York.

As we have proved in subdivisions 1 and 2 of this point, *supra*, the statutes which consent to the court's jurisdiction of suits against the Port Authority state as a primary jurisdictional condition a one-year period for the commencement of suit and these statutes must be strictly construed because they waive sovereign immunity.

The basic argument advanced by appellant in opposition is that Section 24 of the New York Civil Practice Act serves in some way as a basis for interpreting the suability legislation to extend the one-year period expressed by sixty days to offset the period of notice prior to suit.

The apparent basis for appellant's argument that C. P. A. § 24 serves this purpose is not that it is directly applicable to the bi-state suability legislation. He concedes (Brief, pp. 5, 6) that C. P. A. § 24 as a unilateral

[LETTERHEAD OF THE PORT OF
NEW YORK AUTHORITY]

LAW DEPARTMENT
Sidney Goldstein
General Counsel

March 11, 1953

Honorable George M. Shapiro
Counsel to the Governor
Executive Offices
State Capital
Albany, New York

Dear Mr. Shapiro:

We have received your request for comments and recommendation on S. Intro. 748, Print No. 781 and S. Intro. 1021, Print No. 1061, both by Senator W. Mahoney, which are before Governor Dewey for executive action.

These are two of the bills which were cleared, at your suggestion, with Mr. Kent Brown of your office prior to introduction.

S. Intro. 748 would provide for the prohibition of smoking at Air and Marine Terminals operated by the Port Authority within the State of New York.

S. Intro. 1021 would implement the memorandum of agreement executed in 1945 by the Airlines and the Port Authority, through the personal efforts of Governor Dewey, to make the definitive leases for use of New York International Airport by the Airlines enforceable in the courts.

For your convenience, I attach hereto copies of the memoranda submitted by the Port Authority to the Legislature in support of these bills.

Needless to say, the Port Authority is wholeheartedly in support of both of these bills and respectfully recommends that the Governor grant them his approval.

Very truly yours,

By: /s/ SIDNEY GOLDSTEIN
General Counsel

Enclosure

cc: Kent Brown, Esq.,
Assistant Counsel to The Governor

MEMORANDUM

In *Support* of

AN ACT

agreeing with the state of New Jersey with respect to suits against the port of New York authority upon certain leases at New York International Airport.

Through the personal efforts of Governor Dewey a renegotiation of the 1945 New York International Airport (at Idlewild) leases between the City of New York and the Airlines which were party thereto, which leases were assigned by the City, with the consent of the Airlines, to The Port of New York Authority in 1949, was brought to a successful conclusion. The Governor dictated a Memorandum of Agreement upon the principles of proposed new leases of space and services at New York International Airport which was executed by The Port of New York Authority and the United States and foreign flag Airlines at the Executive Offices, Hotel Roosevelt, New York City, on August 5, 1949.

The Memorandum of Agreement provided for the preparation of definitive leases for a 25-year term. It further stipulated that the Port Authority would join the Airlines in sponsoring legislation making these definitive leases enforceable in the courts and making the Port Authority suable upon any cause of action arising out of the Airlines' occupancy of the Airport subsequent to the execution of said leases.

Definitive leases were executed by the Port Authority and the Airlines at a ceremony presided over by Governor Dewey at the Hotel Roosevelt on January 8, 1953.

The definitive leases contain the following provision:

> "The Authority agrees that prior to February 1, 1953, it will recommend to the Governors and Legislatures of the States of New York and New Jersey the adoption of legislation, in the form annexed hereto and marked Exhibits 27 and 28 consenting to suits, actions, or proceedings by the

> Airline against the Authority. The Authority and the Airline shall jointly and actively support and sponsor such legislation until adopted."

The bill in the form called for by this provision is hereby respectfully submitted. It is requested that it be favorably reported and passed.

THE PORT OF NEW YORK AUTHORITY

By (s) AUSTIN J. TOBIN
Austin J. Tobin
Executive Director

AIRLINES NEGOTIATING COMMITTEE

By (s) O.M. MOSIER
O.M. Mosier
Vice President, American Airlines
Chairman